No. 14,960

IN THE

United States Court of Appeals For the Ninth Circuit

WM. P. STUART, Collector of Internal Revenue for the District of Arizona, *Appellant*

v.

J. E. WILLIS AND KING-HOOVER CONSTRUCTION CO., *Appellees*

On Appeal From the Judgment of the United States District Court for the District of Arizona

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BRIEF FOR THE APPELLANT

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CITATIONS

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OPINION BELOW

The court below did not enter an opinion. Its findings of fact and conclusions of law (R. 16-18) are not reported.

JURISDICTION

This appeal involves a suit against William P. Stuart, former Collector of Internal Revenue for the District of Arizona, for recovery of $8,667.23 alleged to have been erroneously or illegally collected as federal income, withholding and social security taxes

for the fourth quarter of 1950 and the first three quarters of 1951. The amount in issue was collected by distraint on or about November 6, 1951. (R. 4, 7.) The claim for refund on which this action was based was filed on or before January 14, 1952 (R. 5, 8, 17) within the time provided by Section 1636 of the Internal Revenue Code of 1939, and was rejected by the Commissioner of Internal Revenue on or about July 29, 1952 (R. 5, 8). The complaint herein was filed on December 17, 1952 (R. 3-6), within the time provided by Section 3772 of the Internal Revenue Code of 1939. The jurisdiction of the court below seemingly was invoked under 28 U.S.C., Section 1340. The findings of fact, conclusions of law and judgment of the court below were entered on June 8, 1955. (R. 16-19.) Notice of appeal was filed on behalf of the Collector on August 1, 1955. (R. 19.) Jurisdiction of the appeal is conferred on this Court by 28 U.S.C., Section 1291.

QUESTIONS PRESENTED

1. Whether the court below lacked jurisdiction of this action because the claim for refund on which it was based was at variance with the complaint.

2. Whether the evidence establishes that a bona fide partnership or joint venture existed between J. E. Willis and King-Hoover Construction Company, plaintiffs below, with respect to the matters here in issue.

3. Whether a purported assignment by King-Hoover Construction Company to J. E. Willis of claims against the United States arising out of a

government contract was valid under Section 3477 of the Revised Statutes.

4. Whether, even if the purported assignment of J. E. Willis was valid, the lien of the United States against the fund in issue for unpaid taxes was prior and superior to the claim of Willis.

5. Whether, in any event, the court below erred in allowing interest on its judgment.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the statutes and Treasury Regulations are printed in the Appendix, *infra*.

STATEMENT

The findings of fact approved by the court below (R. 16-17) consist mostly of ultimate findings or conclusions with respect to which the Government is taking issue on this appeal. Accordingly, this statement will be limited to pertinent facts with respect to which we feel there will be no dispute and leave controverted facts and conclusions for discussion in the following argument.

Under date of November 16, 1950, a written agreement (Ex. 1, Supp. R.),[1] which is the cornerstone

[1] By inadvertance counsel for the Government, in designating portions of the record on appeal herein to be printed, omitted to designate for printing the documents introduced as exhibits at the trial which it is believed will be helpful in considering the issues raised on this appeal. Accordingly, the Clerk of the Court has been requested to print such exhibits as a supplemental record. However, in order to avoid delay in filing the Government's brief or interfering with the hearing of this case references herein to such documents will be to the supplemental record and appropriate page numbers will be supplied later for insertion.

of this action, was entered into between King-Hoover Construction Company, a corporation, Claude Hoover, as an individual, and Harry C. King, as an individual, as first parties, and J. E. Willis and his wife as second parties, in which it was recited that King-Hoover Construction Company was to bid on and construct, if successful in its bid, a railroad job for the United States Government at Bellemont, Arizona; that Hoover and King, as individuals, were interested that King-Hoover be successful in its bid and construction job; that the first parties were desirous of entering into a joint venture with the second parties in the bid and construction job; and that the second parties were willing to enter into a joint venture with the first parties for the construction of the railroad job and provide the additional financing for the venture. It was therefore agreed, in material part, that in the event King-Hoover were successful in its bid, "first parties and second parties will immediately enter into a joint venture in the construction of said job," and that "Second parties are to provide Fifty Thousand Dollars ($50,000.00) in additional financing to be used solely by King-Hoover Construction Co. in the said construction project." As consideration for the investment of their $50,000 the Willises were to receive 8% interest on that amount during the time it was in use in the construction job, or 25% of the net profits from the venture, whichever was greater; that Hoover and King, as individuals, as well as King-Hoover, were to guarantee return of the $50,000 with a profit to second parties of not less than 8% interest for the time the money was in use; that

Lowell Monsees was to be the agent of the second parties in the joint undertaking and was to have joint control with the first parties over all funds used by the parties in connection with the project and to countersign all checks written in connection with the project; that the $50,000 was to be used solely and exclusively in connection with the construction job mentioned; and that the $50,000 was to be returned to the second parties from funds held back by the Government to be paid to King-Hoover upon completion of the job, but that the return of the money was not dependent or contingent upon this source alone.

King-Hoover Construction Company was successful in its bid for the Government railroad construction (referred to in the pleadings and the findings (R. 4, 7, 16), as a railroad rehabilitation job, contract number DA-02-002-AV1-30, Navajo Ordnance Depot, Belmont, Arizona) but the contract is not in evidence and the record does not disclose its terms. No contention has been made, however, that Willis and his wife were parties to the contract.

On the other hand, under date of June 16, 1951, King-Hoover Construction Company, by C. E. Hoover, its president, executed a written document (Ex. 6, Supp. R.) entitled "ASSIGNMENT OF CLAIMS UNDER GOVERNMENT CONTRACT" purporting to assign to Willis and his wife "all monies now due or hereafter to become due from the Sixth Army District Engineers, U. S. Government, under Contract No. DA-02-002-AV1-30 for that certain construction work described as follows" under which it was agreed that the assignees would receive all monies advanced as

a trust fund to be first applied to the payment of claims of laborers, materialmen, subcontractors, and other expenditures arising out of the performance of the contract, and to thereafter credit the balance to the obligation of the assignor to the assignees under the agreement of November 16, 1950, and refund any excess to the assignor.

On or about November 6, 1951, King-Hoover Construction Company became entitled to receive funds in the sum of $12,278.18 from the United States Government, being the balance due it upon completion of the above railroad rehabilitation contract No. DA-02-002-AV1-30, Navajo Ordnance Depot, Bellemont, Arizona. On or about the same date, November 6, 1951, the Collector levied upon this final payment and applied it to federal taxes previously assessed against King-Hoover Construction Company. (R. 4, 7, 17.) Thereafter the claim for refund on which this action was based was timely filed, and upon its rejection the present action was brought. The claim for refund (Ex. 3, Supp. R.) was filed in the names of J. E. Willis and King-Hoover Construction Company and both parties were named as plaintiffs in this action (R. 3). The court below found that the plaintiffs were partners in a joint venture organization doing business as and under the name and style of King-Hoover Construction Company and J. E. Willis by reason of the terms of the above contract of November 16, 1950; that King-Hoover Construction Company made an assignment of all of its right, title and interest in the proceeds of funds due from the United States under the above railroad rehabilitation

contract by the above assignment of June 16, 1951; that the Collector levied an attachment on the above final payment of $12,278.18 due under that contract and "out of said sum * * * the amount of $8667.23 was applied to payroll taxes which were not the obligation of the plaintiffs as a joint venture"; that the obligations of the joint venture were fully paid and discharged; that the sum of $8,667.23 was due J. E. Willis under the joint venture agreement and King-Hoover, as a member of the joint venture had no right, title, interest or equity in and to such $8,667.23; and that the plaintiff, J. E. Willis, made a proper claim to the Collector for refund of the $8,667.23. (R. 16-17.)

The court below further concluded as a matter of law that the agreement of November 16, 1950, created a joint venture between the parties; that the assignment executed by King-Hoover Construction Company under date of June 16, 1951, gave J. E. Willis a lien on the proceeds of the above railroad rehabilitation contract prior and superior to that of the United States with respect to the amount here involved; and that the Collector wrongfully levied upon the proceeds of the contract and wrongfully and illegally applied $8,667.23 thereof to obligations of King-Hoover Construction Company. (R. 17-18.)

On the basis of these findings and conclusions the court below entered judgment for J. E. Willis in the sum of $8,667.23 with interest thereon at the rate of 6% from November 6, 1951, until paid (R. 18-19), and the Government appealed (R. 19).

STATEMENT OF POINTS TO BE URGED

The Government relies upon the following errors as a basis for this appeal (R. 21):

1. The trial court erred in holding that it had jurisdiction of this action, since the claim for refund was at a variance with the complaint.

2. The trial court erred in holding that a bona fide partnership existed between Willis and the King-Hoover Construction Company.

3. The court erred in holding that the purported assignment of the corporation to Willis did not violate Section 3477 of the Revised Statutes.

4. The trial court erred in not holding that the Government's tax lien was superior to that of Willis, even if the assignment to Willis be held to be a legal assignment.

SUMMARY OF ARGUMENT

The sum in suit represents a portion of the balance which was due on a construction contract between King-Hoover Construction Company and the United States which in its entirety, we submit, was correctly applied toward the payment of federal payroll taxes assessed against King-Hoover Construction Company. No contention is made that King-Hoover Construction Company did not owe the taxes assessed against it.

The claim for refund here, which we submit differs from the complaint and the theory upon which judgment was rendered, was filed by J. E. Willis and King-Hoover Construction Company as a purported joint venture. The claim asserts an overpayment of

taxes by the joint venture by assuming that a portion of the balance due King-Hoover Construction Company on the construction contract has been applied to the joint venture taxes set up for the first time in a schedule attached. King-Hoover Construction Company disclaims any right to any portion of the asserted overpayment. The purported joint venture also erroneously credits itself as having paid $6,167.67 which was paid by check toward King-Hoover Construction Company's payroll taxes and credited to King-Hoover Construction Company on May 11, 1951. In addition, there is no showing here that the purported joint venture's taxes were overpaid for there is failure of proof of what amount, if any, of taxes were due from the purported joint venture.

On the other hand, the complaint alleges that plaintiffs became entitled to receive the balance due on the completion of the contract between the United States and King-Hoover Construction Company; and that the Collector levied attachment thereon and applied a portion thereof, the full sum in suit, in payment of payroll taxes which were not the obligation of the purported joint venture. This, we submit, is the basis of the District Court's decision. The court ruled that the Collector applied the sum in suit "to obligations of the King-Hoover Construction Co." The ruling that the sum was illegally so applied is based upon the District Court's holding that a joint venture was created by the agreement between King-Hoover Construction Company and the Willises dated November 16, 1950; and that King-Hoover Construction Com-

pany had validly assigned to the Willises on June 16, 1951, all its right, title and interest in the balance which became due under the government contract in November, 1951. Judgment for a portion of this amount was entered for Willis. No judgment was rendered for King-Hoover Construction Company. The complaint also alleged that the sum in suit was applied to taxes, penalties and interest unlawfully assessed against plaintiffs. But there was no showing of assessments against the plaintiffs as a joint venture; and the record shows that the sum in suit was applied to the payroll taxes of King-Hoover Construction Company alone.

We submit that the agreement between the Willises and King-Hoover Construction Company did not create a joint venture but was a mere loan agreement. King-Hoover Construction Company was to and did perform the construction work, while all that the Willises were to do or did do was to put up the $50,000 provided therein, and protect it by control of its expenditure through their agent Monsees. The Willises did not put the money they advanced at the risk of the project, but were guaranteed repayment not only by King-Hoover Construction Company but also by King and Hoover as individuals, all of whom also guaranteed payment of 8% per annum thereon; and the provision that the Willises were to receive interest of 8% per annum or 25% of the profits was merely the measure of what the Willises were to receive for the use of their money. In fact, a suit by Willis against King-Hoover Construction Company,

Hoover and King, as individuals, was pending at the time of the trial of this suit.

In any event this contract is not binding on the United States either as a joint venture or as an assignment to Willis by King-Hoover Construction Company of any of its rights under the government contract. The United States entered into the construction contract with King-Hoover Construction Company only. As an assignment of King-Hoover Construction Company's rights under the government contract it was for several reasons void as contra to Section 3477 of the Revised Statutes.

The purported assignment by King-Hoover Construction Company to the Willises of June, 1951, was void as to the United States in that it was in violation of Section 3477 of the Revised Statutes which prohibits assignments of claims against the United States excepting claims which have been determined and allowed. Nor do the Willises come within the exception as to banks, trust companies, and other financial institutions. Further, even an assignment to such a financial institution may not be made to more than one party unless to one party as agent or trustee "for two or more parties *participating in such financing*". (Italics supplied.) The purported assignment here was to a trustee for many parties which did not participate in financing King-Hoover Construction Company's contract.

The District Court also erred in its allowance of interest.

ARGUMENT

I

The Court Below Was Without Jurisdiction of This Action Because It Was Based on Grounds Not Set Forth in the Refund Claim

The provisions of the internal revenue laws relating to the filing of refund claims and suits for refund of amounts paid as internal revenue taxes are available only to taxpayers. And it has long been settled that a court has jurisdiction to entertain a suit for refund only where the complaint is based upon grounds stated in the taxpayer's refund claim, and he has complied strictly with the conditions precedent under which the right to sue has been granted.[2] In the light of these principles, we submit the court below was without jurisdiction to entertain the present action. J. E. Willis, the only interested plaintiff and the only one to benefit from the court's judgment, was not a taxpayer entitled to the benefit of the applicable provisions of the Internal Revenue Code of 1939,[3] and the action was based on grounds not asserted in the refund claim.

The claim for refund upon which this action is based was filed in the names of J. E. Willis and King-Hoover

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[2] See *United States* v. *Felt & Tarrant Co.*, 284 U.S. 269; *United States* v. *Memphis Cotton Oil Co.*, 288 U.S. 62; *United States* v. *Henry Prentiss & Co.*, 288 U.S. 73; *United States* v. *Factors & Finance Co.*, 288 U.S. 89; *Bemis Bro. Bag Co.* v. *United States*, 289 U.S. 28; *United States* v. *Andrews*, 302 U.S. 517; *United States* v. *Garbutt Oil Co.*, 302 U.S. 528; *Angelus Milling Co.* v. *Commissioner*, 325 U.S. 293; *Vica Co.* v. *Commissioner*, 159 F. 2d 148 (C.A. 9th), certiorari denied, 331 U.S. 833; *United States* v. *Chicago Golf Club*, 84 F. 2d 914 (C. A. 7th).

[3] Section 3772(a)(1) of the 1939 Code, and Section 29.322-3 of Treasury Regulations 111. (Appendix, *infra.*)

Construction Company as an alleged joint venture for the refund of an alleged overpayment of social security taxes and withholding taxes. (Ex. 3, Supp. R. .) The claim asserted:

> The amount of $8,667.23 [the full amount claimed] represents an overpayment of taxes by the joint venture, details of which are submitted on attached schedules. The joint venture included only the Railroad Rehabilitation job, Contract number DA-02-002-AV1-30, Navajo Ordnance Depot, Bellmont, Arizona, see joint venture agreement attached.
>
> No part of the $8,667.23 is claimed by the King-Hoover Construction Co.

This suit was instituted in the names of J. E. Willis and King-Hoover Construction Company, a joint venture. It is alleged in paragraphs II, III and IV of the complaint (R. 4) that there was a balance due plaintiffs for completion of the above railroad rehabilitation job of $12,278.18 upon which the Collector levied an attachment and applied $8,667.23 thereof in payment of payroll taxes "which payroll taxes were not the obligation of these plaintiffs as a joint venture"; and that the entire amount of the sum of $8,667.23 "constitutes assets in which plaintiff, J. E. Willis, has the sole and exclusive equity * * *." Further, plaintiffs allege in paragraph V of the complaint (R. 4-5) that they protested the attachment "of that portion of said funds not applied in payment of obligations of plaintiffs." The answer (paragraphs II, III, IV, V and VI, R. 7-8) denies the allegations of paragraphs II, III, IV, V and VI of the complaint

except that it is admitted that the sum of $12,278.18 was due King-Hoover Construction Company on the rehabilitation contract, that $8,667.23 thereof was applied in payment of payroll taxes of King-Hoover Construction Company; and that a claim for refund had been filed and disallowed in its entirety.

It is thus seen that in the claim for refund plaintiffs asserted that there had been an overpayment of taxes of the alleged joint venture,[4] while it is clear from the complaint as well as from the District Court's findings (R. 16-17) and judgment (R. 18-19) that recovery was sought here by Willis and granted on the ground that the Collector had distrained upon and applied to the payment of taxes admittedly owing by King-Hoover Construction Company money to which Willis asserts a superior claim, not as a tax-

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[4] It is to be noted, as will appear *infra,* Willis was not a party to the government contract (R. 87); that all returns that were filed of payroll taxes were filed by King-Hoover Construction Company (R. 46, 112-113); no contention is made and it has not been shown that the alleged joint venture filed any returns for payroll taxes; the alleged joint venture filed no income tax returns (R. 112); all taxes were assessed against King-Hoover Construction Company (R. 45, 124-125); all payments were applied or paid toward the taxes due from King-Hoover Construction Company (R. 18, 127). Yet in making up the unverified schedule to the claim for refund (Ex. 3, admitted only for limited purposes not including correctness of amounts, R. 43-44, 96-97, 103-104), plaintiffs calculated an alleged overpayment of payroll taxes due in connection with the railroad rehabilitation job alone (though King-Hoover Construction Company was performing other jobs during the same period), and from this they deducted a check paid on King-Hoover Construction Company's payroll taxes. The result they treated as a balance of payroll taxes due from the alleged joint venture, which they in turn deducted from the balance due King-Hoover Construction Company under the construction contract (which had been applied to King-Hoover Construction Company's taxes). They then claimed the balance as an overpayment of taxes of the alleged joint venture.

payer, but either under the agreement of November 16, 1950, or the purported assignment of June 16, 1951, both of which will be discussed *infra* more in detail. Thus, there is patent variance between the claim for refund and the complaint. Hence, the court was without jurisdiction of this suit against the Collector. See the cases cited in footnote 2, *supra.*

The instant suit, we submit, is clearly distinguishable from the decision of this Court in *Stuart* v. *Chinese Chamber of Commerce of Phoenix,* 168 F. 2d 709. There, funds were seized by the Collector from a third party. Here, the fund involved was an amount due from the United States to King-Hoover Construction Company. It is admitted that at the time King-Hoover Construction Company owed the Government at least an equal amount in taxes. In such circumstances, the Government certainly was entitled to set off the balance due on the contract against the taxes owed by King-Hoover Construction Company. Cf. *United States* v. *Winnett,* 165 F. 2d 149 (C.A. 9th). This, in effect, is what was done. In such circumstances, the United States is a necessary party, in fact the only party interested. No attempt has been made to make it a defendant.

II

The Agreement of November 16, 1950, Between Willis and King-Hoover Construction Company, et al. Did Not Create a Joint Venture; But Regardless of Its Effect Between the Parties Thereto, It Was Neither a Joint Venture Nor an Assignment in Any Way Binding Upon the United States

While we submit that the District Court's finding and conclusion (R. 16, 17-18) that the agreement of November 16, 1950 (Ex. 1, Supp. R.), created a

joint venture between the parties is clearly contra to the provisions of the agreement, and finds no support in the record, we also submit that even so assuming *arguendo,* it is of no aid to the plaintiffs either as an assignment or to support a claim for the refund of taxes which were returned by and paid or applied to the account of King-Hoover Construction Company alone. Yet plaintiffs' whole case is based upon this premise.

The contract of November 16, 1950, under which the District Court concluded that the Willises and King-Hoover Construction Company became joint venturers was an anticipatory agreement between King-Hoover Construction Company, a corporation, and Hoover as an individual, and King as an individual, as first parties, and Willis and his wife as second parties. We submit that it is clear that this contract, though it refers to the agreement as a joint venture, was a mere loan agreement with a guarantee of repayment of the principal together with "eight percent (8%) per annum interest" on the sum loaned, or 25% of the net profits, whichever is greater. Cf. *Pierce* v. *McDonald,* 168 App. Div. 47, 153 N.Y.S. 810.

The instrument recites that the King-Hoover Construction Company is to bid on and construct, if successful in its bid, a railroad job for the United States at Belmont, Arizona; that Hoover and King, as individuals, are interested that the King-Hoover Construction Company be successful in its bid and construction project; that the first parties are desirous of entering into a joint venture with the second parties in the bid and construction "in order to be provided

with additional financing"; and that the second parties are willing to enter into a joint venture with first parties for construction of the job "and provide the additional financing for the said venture."

Under the agreement the Willises were to provide $50,000 as additional financing "to be used solely by King-Hoover Construction Co. in the said construction project. As consideration for the investment by the Willises of the $50,000, they were to receive "eight percent (8%) per annum interest on the said Fifty Thousand Dollars ($50,000.00) during the time it is used in the joint venture or twenty-five percent (25%) of the net profits from the said venture, whichever is greater."

However, in the instrument it was agreed that Hoover and King, as individuals, as well as King-Hoover Construction Company, "are to guarantee the return of the said Fifty Thousand Dollars ($50,000.00) * * * with a profit * * * of not less than eight percent (8%) per annum interest" for the time the $50,000 was used in the project. It was also agreed that Monsees was to be the agent of the Willises "in this joint undertaking and is to have joint control with first parties over all funds used by the parties in connection with this project, and is to countersign all checks written in connection with this project."

In this contract it was also agreed "that the said Fifty Thousand Dollars ($50,000.00) is to be returned to second parties from funds held back by the United States Government to be paid to King-Hoover Construction Co. upon the completion of the said job. It is agreed, however, that the return to the second parties

of the said Fifty Thousand Dollars ($50,000.00) is not dependent or contingent upon this source alone."

The provision that Willis was to be paid 8% interest or 25% of net profits was clearly a measure of the amount to be paid for the use of the money advanced by him. Cf. *Chapman* v. *Dwyer,* 40 F. 2d 468 (C.A. 2d). The parties so treated it.

The testimony of Monsees (R. 47-101), Hoover (R. 143-148), and Pomeroy (R. 101-118) shows the construction work on the government contract was performed solely by King-Hoover Construction Company, the corporation using its own employees and building equipment. The corporation kept the books and records for this job. These books were not produced at trial. However, the testimony of Pomeroy shows that the advance or loan "wasn't set up as a capital account" for Willis or his wife. (R. 114.) The corporation made all payroll tax returns, including therein such taxes for all of its projects for the entire period covered by the government contract for which the joint venture is asserted (R. 46, 112-113; Ex. 4, Supp. R.) in its own name, and also paid the Arizona State employment taxes (R. 93, 94; Ex. 7, Supp. R.). All assessments for federal payroll taxes were made against King-Hoover Construction Company alone. (R. 45, 124-125.) All payments were applied or made toward the payroll taxes of King-Hoover Construction Company alone. (R. 18, 127.) The unverified schedule later made up to support the claim for refund was admitted for limited purposes only not including its correctness. (R. 103-104.) It cannot be considered as showing

taxes which were due on this project alone, or as evidence that the parties considered they were co-adventurers. It is not contended that any payroll tax returns were filed by the alleged joint venture. Pomeroy testified that to his knowledge no copartnership income tax return was filed. (R. 112.)

But regardless of the effect of the November 16, 1950, agreement between the parties thereto, it was neither a joint venture nor an assignment in any way binding upon the United States. Any rights of Willis would be purely derivative. Cf. *Burnet* v. *Leininger,* 285 U.S. 136. The contract for the job referred to in the above anticipatory agreement, after its successful bid by King-Hoover Construction Company alone, became number DA-02-002-AVI-30, Navajo Ordnance Depot, Bellmont, Arizona. This contract was entered into between the United States and King-Hoover Construction Company alone. Plaintiffs' counsel stipulated at the trial that Willis "was not a party to the contract, not privy to the contract, and had under that contract no rights or duties." (R. 87.)

It is thus seen that the United States dealt with King-Hoover Construction Company alone. Under its contract with King-Hoover Construction Company alone it owed King-Hoover Construction Company alone $12,278.18. Thus, any rights acquired by the parties under their agreement are limited to rights between the parties, and not binding in any way upon the United States. Otherwise, this agreement would violate Section 3477 of the Revised Statutes which is discussed next following relative to the assignment of claims against the United States, which it would serve

no purpose to repeat here. Cf. *Dulaney* v. *Scudder*, 94 Fed. 6 (C.A. 5th).

III

The Purported Assignment by King-Hoover Construction Company to J. E. Willis Was Not Valid Under Section 3477 of the Revised Statutes

The court below also found (R. 16-17) that King-Hoover Construction Company—

> made an assignment of all of its right, title and interest in the proceeds of funds due from the United States Government under contract number DA-02-002-AVI-30 Navajo Ordnance Depot, Bellmont, Arizona, by assignment dated June 16, 1951.

The court further concluded as a matter of law (R. 18) that the purported assignment of June 16, 1951—

> gave the plaintiff J. E. Willis, a lien on the proceeds of that certain contract number DA-02-002-AVI-30 Navajo Ordnance Depot, Bellmont, Arizona, prior and superior to that of the United States Government except for the claim of the United States Government for payroll taxes and other deductions growing out of the performance of said contract in the sum of $3610.95.

The instrument executed by officers of King-Hoover Construction Company under date of June 16, 1951 (Ex. 6, Supp. R.), is entitled "ASSIGNMENT OF CLAIMS UNDER GOVERNMENT CONTRACT", and recites that for value received the corporation "hereby assigns, transfers and sets over unto JOHN E. WILLIS

and EDITH P. WILLIS, his wife, * * * all monies now due or hereinafter to become due from the Sixth Army District Engineers, U. S. Government, under Contract No. DA-02-002-AVI-30 * * *." The agreement provides, however, that:

> It is agreed that the Assignees will receive all monies advanced hereunder as a trust fund to be first applied to the payment of claims of laborers, materialmen, subcontractors, and of other expenditures arising out of the performance of said contract that may be now due or due in the future, and to thereafter credit the balance collected pursuant to this assignment to the obligation of the Assignor to the Assignees pursuant to that contract dated November 16, 1950, * * * *and to refund to the Assignor any and all amounts collected pursuant hereto which exceed the just and proper amount due the assignees pursuant to the aforesaid agreement,* after claims of laborers, materialmen and subcontractors have been paid. The Assignor does hereby covenant that it has not heretofore alienated, or assigned said construction contract or any rights or interests therein or thereto. (Italics supplied.)

An assignment of a claim against the United States, in order to be valid, must comply with the law pertaining to such assignments, and we submit the purported assignment of June 16, 1951, was void under Section 3477 of the Revised Statutes, as amended (Appendix, *infra*), and was ineffective to convey any right, title or interest to J. E. Willis in payments due King-Hoover Construction Company under its contract with the Government.

Section 3477 of the Revised Statutes, as amended by the Assignment of Claims Act of 1940, and the Act of May 15, 1951, provides that all transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof,—

> *shall be absolutely null and void,* unless they are freely made and executed *in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof.* Such transfers, assignments, and powers of attorney, *must recite the warrant for payment,* and must be acknowledged by the person making them, before an officer having authority to take acknowledgments of deeds, and shall be certified by the officer; and *it must appear by the certificate that the officer, at the time of the acknowledgment, read and fully explained the transfer, assignment, or warrant of attorney to the person acknowledging the same.* (Italics supplied.)

The statute was designed to protect the Government from conflicting claims and multiple liability. *Martin* v. *National Surety Co.,* 300 U.S. 588, 594. It must be strictly complied with, and the record in this case is barren of any evidence of such compliance other than the introduction in evidence of the document executed June 16, 1951, when counsel for plaintiffs stated (R. 60):

> If the Court please, we are not too particularly concerned about the force or effect of this, except we introduce it for the purpose of showing the arrangement between these two parties.

The purported assignment here is not limited to an amount ascertained to be due, nor after the allowance of a claim and the issuance of a warrant, but attempts to include sums to become due. The Willises do not come within the classes to which assignment of *sums to become due* is permitted—discussed *infra.* Aside from this, there is no proof of compliance with Section 3477 of the Revised Statutes. The instrument does not recite "the warrant for payment". There is no showing that a claim of the assignor had been allowed. The certificate of acknowledgment does not show that the "officer * * * read and fully explained the * * * assignment * * * to the person acknowledging the same", which the statute says "must appear". There is no showing that it was made in the presence of two attesting witnesses.

The statute provides that the provisions above discussed shall not apply in any case in which the amounts due or to become due from the United States, or from any agency or department thereof, under a contract providing for payments aggregating $1,000 or more *"are assigned to a bank, trust company, or other financing institution, including any Federal lending agency;"* (italics supplied) provided (in so far as pertinent here): That in the case of a contract entered into after the enactment of the 1940 Act no claim shall be assigned if it arises under a contract which prohibits such assignment; that the assignee file

written notice of the assignment, together with a true copy thereof, with (a) the contracting officer or the head of his department or agency; (b) the surety or sureties upon the bond or bonds, if any, in connection with such contract; and (c) the disbursing officer, if any, designated in such contract to make payment.

Certainly the Willises do not come within the provision of a bank, trust company, or other financing institution, or any federal lending agency. Aside from this, there is no showing that contract number DA-02-002-AVI-30 did not prohibit assignment. There is no showing that the assignees complied with any of the enumerated requirements of the statute.

A further proviso of Section 3477 of the Revised Statutes governing assignment to the excepted enumerated financing institutions is that it shall cover all amounts payable under the contract not already paid, and shall not be made to more than one party "except that any such assignment may be made to one party as agent or trustee for two or more parties *participating* in such financing". (Italics supplied.) The document here purports to assign to the Willises all monies then due or thereafter to become due under the contract. However, in the document it is agreed that the assignees will receive all "monies advanced hereunder" as a trust fund to be first applied to the payment of claims of laborers, materialmen, etc., and other expenditures arising out of the performance of the contract then due or "due in the future" and to thereafter credit the balance collected to the obligation of the assignor to the assignees pursuant to the agreement of November 16, 1950, and to refund any excess

to the assignor. (Ex. 6, Supp. R. .) Thus, clearly the attempted assignment violates the statute in that it is an assignment to more than one party, and not an assignment to one party as agent or trustee for two or more parties participating in the financing.

The purported assignment is clearly void as to the United States. The Willises could not have collected from the United States any sum due King-Hoover Construction Company under the contract. Cf. *Dulaney* v. *Scudder,* 94 Fed. 6 (C.A. 5th). They could not prevent the United States from setting off any such sums due King-Hoover Construction Company against taxes due from King-Hoover Construction Company. This, in effect, is what was done here. The sum involved has never left the United States. It merely took it from one hand and placed it in another. *A fortiori,* the purported assignment cannot be asserted as the basis of a lien which primes the Government's lien for taxes.

In such circumstances the purported assignment cannot be asserted as the basis for a judgment against the Collector who took from the United States for the United States to apply to taxes owed to the United States. Cf. *Stuart* v. *Chinese Chamber of Commerce of Phoenix, supra.*

IV

The Court Below Erred in Holding That Willis Had a Lien Upon the Proceeds of the Government Contract Prior and Superior to That of the United States

It is difficult under any theory to uphold the court's ruling that Willis had a lien on proceeds due King-Hoover Construction Company under the government

contract which amounted to $8,667.23. The $50,000 advance called for and made under the agreement of November 16, 1950, plus one-fourth of King-Hoover Construction Company's profits under the government contract, $6,000 (R. 56), total $56,000. Of this amount Mr. Willis received $52,000. (R. 81.) It is thus seen that these figures leave a balance of only $4,000 due to Willis by King-Hoover Construction Company under this agreement.

Mr. Monsees testified (R. 74): "I had to advance money in addition to what we had originally agreed to advance to get the job completed"; that he loaned an additional amount out of his own funds. (R. 74.) Mr. Monsees advanced out of his own funds in September, 1951, $7,800. (R. 81.) In arriving at the amount claimed to be due Willis, this sum was treated a san amount covered by the agreement and the purported assignment. There is nothing in the record whatever to disclose that this advance of Monsees was covered by either, other than the testimony of Monsees that he got it back from Mr. Willis. The purported assignment merely provides for a credit of any sums collected thereunder "to the Assignees pursuant to that contract dated November 16, 1950". (Ex. 6, Supp. R. .) It thus appears that even if it be assumed *arguendo* that the agreement and assignment are effective as against the United States, Willis' lien could not have been upon an amount in excess of $4,000—$56,000 less the $52,000 returned to him by King-Hoover Construction Company.

We submit, however, that it has been demonstrated *supra,* under points II and III, that neither the agree-

ment nor the assignment, even if effective between the parties, was effective against the United States; that the United States was entitled to set off the sum due King-Hoover Construction Company against the taxes owed by King-Hoover Construction Company.

V

The Court Below Erred in Its Allowance of Interest on the Judgment Entered

28 U.S.C., Section 2411(a), provides that in any judgment against the United States or Collector of Internal Revenue for any overpayment in respect of any internal revenue tax, interest shall be allowed at the rate of 6% per annum upon the amount of the overpayment from the date of payment or collection "to a date preceding the date of the refund check by not more than thirty days, such date to be determined by the Commissioner of Internal Revenue." Subsection (b) of Section 2411 provides that except as otherwise provided in subsection (a), on all final judgments rendered against the United States in actions instituted under Section 1346 of 28 U.S.C., interest shall be computed at the rate of 4% per annum from the date of the judgment up to, but not exceeding, thirty days after the date of approval of any appropriation Act providing for payment of the judgment.

Here, the District Court rendered judgment "together with interest thereon at the rate of 6% per annum from the 6th day of November, 1951, until paid". (R. 18-19.) Thus, the judgment as to interest would be wrong even if it were a judgment for an overpayment of taxes. As stated above, the court in its Conclusion of Law 3 (R. 18) ruled that the sum

in suit had been illegally applied to obligations of King-Hoover Construction Company. No contention is made that the taxes of King-Hoover Construction Company were overpaid; and, as has been demonstrated *supra,* the judgment here is based upon the court's ruling that the purported assignment of King-Hoover Construction Company to Willis gave Willis a lien on the proceeds of the government contract. (Conclusion of Law 2, R. 18.) In other words, it is clear that the court has ruled that the Government has applied a fund upon which Willis had a lien to the taxes of King-Hoover Construction Company. This is not a ruling that taxes of the purported joint venture were overpaid.

CONCLUSION

For the reasons stated above we submit the judgment of the District Court was wrong. It should be reversed and the cause remanded to the District Court with directions to dismiss the complaint, with costs to the plaintiffs.

Respectfully submitted,

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MARCH, 1956.

APPENDIX

Internal Revenue Code of 1939:

SEC. 181. PARTNERSHIP NOT TAXABLE.

Individuals carrying on business in partnershi shall be liable for income tax only in thei individual capacity.

(26 U.S.C. 1952 ed., Sec. 181.)

SEC. 187. PARTNERSHIP RETURNS.

Every partnership shall make a return for eac taxable year, stating specifically the items of it gross income and the deductions allowed by thi chapter and such other information for the pur pose of carrying out the provisions of this chapte as the Commissioner with the approval of th Secretary may by regulations prescribe, and shal include in the return the names and addresses o the individuals who would be entitled to shar in the net income if distributed and the amoun of the distributive share of each individual. Th return shall be sworn to by any one of the partners

(26 U.S.C. 1952 ed., Sec. 187.)

SEC. 3670. PROPERTY SUBJECT TO LIEN.

If any person liable to pay any tax neglects o refuses to pay the same after demand, the amoun (including any interest, penalty, additiona amount, or addition to such tax, together with an costs that may accrue in addition thereto) shal be a lien in favor of the United States upon al property and rights to property, whether real o personal, belonging to such person.

(26 U.S.C. 1952 ed., Sec. 3670.)

SEC. 3671. PERIOD OF LIEN.

Unless another date is specifically fixed by law, the lien shall arise at the time the assessment list was received by the collector and shall continue until the liability for such amount is satisfied or becomes unenforceable by reason of lapse of time.

(26 U.S.C. 1952 ed., Sec. 3671.)

SEC. 3672 [As amended by Sec. 401, Revenue Act of 1939, c. 247, 53 Stat. 862, and Sec. 505, Revenue Act of 1942, c. 619, 56 Stat. 798]. VALIDITY AGAINST MORTGAGEES, PLEDGEES, PURCHASERS, AND JUDGMENT CREDITORS.

(a) *Invalidity of Lien Without Notice.*—Such lien shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the collector—

(1) *Under state or territorial laws.*—In the office in which the filing of such notice is authorized by the law of the State or Territory in which the property subject to the lien is situated, whenever the State or Territory has by law authorized the filing of such notice in an office within the State or Territory; or

(2) *With Clerk of District Court.*—In the office of the clerk of the United States district court for the judicial district in which the property subject to the lien is situated, whenever the State or Territory has not by law authorized the filing of such notice in an office within the State or Territory; or

(3) *With Clerk of District Court of the United States for the District of Columbia.*—In the office of the clerk of the District Court of

the United States for the District of Columbia, if the property subject to the lien is situated in the District of Columbia.

* * * * *

(26 U.S.C. 1952 ed., Sec. 3672.)

SEC. 3772. SUITS FOR REFUND.

(a) *Limitations.*—

(1) *Claim.*—No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.

* * * * *

(26 U.S.C. 1952 ed., Sec. 3772.)

SEC. 3797. DEFINITIONS.

(a) When used in this title, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof—

* * * * *

(2) *Partnership and Partner.*—The term "partnership" includes a syndicate, group, pool, joint venture, or other unincorporated organization, through or by means of which any business, financial operation, or venture is carried on, and which is not, within the meaning

of this title, a trust or estate or a corporation; and the term "partner" includes a member in such a syndicate, group, pool, joint venture, or organization.

* * * * *

(26 U.S.C. 1952 ed., Sec. 3797.)

REVISED STATUTES [As amended by Section 1, Assignment of Claims Act of 1940, c. 779, 54 Stat. 1029, and the Act of May 15, 1951, c. 75, 65 Stat. 41):

SEC. 3477. All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. Such tranfers, assignments, and powers of attorney, must recite the warrant for payment, and must be acknowledged by the person making them, before an officer having authority to take acknowledgments of deeds, and shall be certified by the officer; and it must appear by the certificate that the officer, at the time of the acknowledgment, read and fully explained the transfer, assignment, or warrant of attorney to the person acknowledging the same.

The provisions of the preceding paragraph shall not apply in any case in which the moneys due or to become due from the United States or from

any agency or department thereof, under a contract providing for payments aggregating $1,000 or more, are assigned to a bank, trust company, or other financing institution, including any Federal lending agency: *Provided,*

1. That in the case of any contract entered into prior to the date of approval of the Assignment of Claims Act of 1940, no claim shall be assigned without the consent of the head of the department or agency concerned;

2. That in the case of any contract entered into after the date of approval of the Assignment of Claims Act of 1940, no claim shall be assigned if it arises under a contract which forbids such assignment;

* * * * *

4. That in the event of any such assignment, the assignee thereof shall file written notice of the assignment together with a true copy of the instrument of assignment with (a) the contracting officer of the head of his department, or agency (b) the surety or sureties upon the bond or bonds if any, in connection with such contract; and (c) the disbursing officer, if any, designated in such contract to make payment.

* * * * *

(31 U.S.C. 1952 ed., Sec. 203.)

Treasury Regulations 111, promulgated under the Internal Revenue Code of 1939:

Sec. 29.322-3 [As amended by T.D. 5325, 1944 Cum. Bull. 152, 153; T.D. 5425, 1945 Cum. Bull. 10, 38; T.D. 5680, 1949-1 Cum. Bull. 126; and T.D. 5772, 1950-1 Cum. Bull. 117]. *Claims for Refund*

by Taxpayers.—Claims by the taxpayer for the refunding of taxes, interest, penalties, and additions to tax erroneously or illegally collected shall be made on Form 843, or on Form 1040 or short Form 1040A, or by the use of Form W-2 (Rev.), or Employee's Optional Form 1040A, or an amended return, and should be filed with the collector of internal revenue. A separate claim shall be made for each taxable year or period.

* * * The claim must set forth in detail and under oath each ground upon which a refund is claimed, and facts sufficient to apprise the Commissioner of the exact basis thereof. * * * A claim which does not comply with this paragraph will not be considered for any purpose as a claim for refund. * * *

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